

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1320

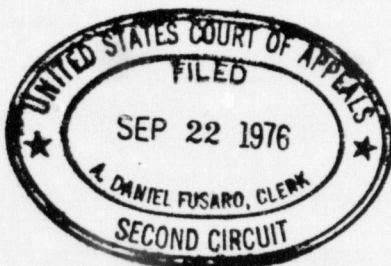
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
KINGSLEY ROTARDIER and
JUAN MacDOUGAL-PENA,
Defendants-Appellants.
-----X

B P/S
Docket No. 76-1320

BRIEF FOR APPELLANT MacDOUGAL-PENA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA,

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-against-

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Defendants-Appellants.

Docket No. 76-1320

BRIEF FOR APPELLANT MacDOUGAL-PENA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the evidence presented at trial was insufficient to support either the conspiracy or the substantive convictions for transportation of stolen goods in interstate commerce.

2. Whether it was reversible error to fail to charge the jury that mere presence coupled with knowledge will not establish participation.

3. Whether it was reversible error to instruct the jury that possession of the securities and coins would give rise to an inference of knowledge that the property was stolen.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal) rendered on June 30, 1976, after a trial before a jury, convicting appellant Pena of conspiracy to transport stolen securities and coins in interstate commerce (Count One) and the transportation of securities (Count Two) and coins (Count Three) in interstate commerce, in violation of 18 U.S.C. §§371 and 2314. Appellant Pena was sentenced to concurrent three-year periods of incarceration on each count.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A superseding indictment filed on May 14, 1976, charged Kingsley Rotardier and appellant Juan MacDougal-Pena with a 1974 conspiracy to transport stolen securities and silver coins from St. Croix, Virgin Islands, to New York (Count One), and with two substantive counts of transporting the securities (Count Two) and the coins (Count Three) from St. Croix to New

York.¹ The securities and the coins were stolen from two St. Croix residences owned by Caroline Hyde Swift. The securities, all common stocks, were in the name of either Mrs. Swift, her son, Stephen Hyde Swift, or the Arthur Hyde Foundation. The coins were primarily United States silver coins minted before 1935.

The prosecution's theory of the case was that Rotardier, appellant Juan MacDougal-Pena, and appellant Pena's brother, Juagin MacDougal Pena,² burglarized Mrs. Swift's St. Croix property and then transported the spoils to New York to dispose of them. The Government's evidence, however, establishes only Rotardier's involvement in the crime.

Caroline Hyde Swift (115-154³) and her employee, Viola Westerman (154-205), testified concerning their acquaintance with Kingsley Rotardier, whom they knew as Div Revault, and the circumstances surrounding the disappearance of the securities and coins. Mrs. Swift recalled that some time late in

¹The superseding indictment was presented to defense counsel on May 18, 1976, the morning on which trial in this case began. It added two counts to the original indictment, which had charged only transportation of stolen securities. A trial on the previous indictment (74 Cr. 824) ended in a mistrial when the jurors were unable to reach a verdict.

²Juagin Pena was an unindicted co-conspirator.

³Numerals in parentheses refer to pages of the transcript of the trial.

March 1974 Rotardier, accompanied by a Mrs. Espinosa, a native of Cruzan, visited at Mrs. Swift's home at Fredriksted, St. Croix, to inquire about Rotardier's renting an apartment in the house (117-118). The house, called "Hill Villa," is a two-story Dutch style manor house, which has a complete and separate apartment on each floor (115). Mrs. Swift occupied the second floor apartment and, beginning in April, rented the ground floor apartment to Rotardier (118); Rotardier was the sole tenant (119), but, according to both Mrs. Swift and Viola Westerman, three other persons, including Pena, whom they knew as "Dominic," moved in with him (19, 158).⁴

By May 1974 Rotardier was in arrears in his rent and was notified by Mrs. Swift's attorney that if he failed to make payments, he would have to move (120). Despite this warning, no further rent payments were made, but Rotardier retained possession of the apartment until some time in July of that year.

Mrs. Swift was then on vacation away from St. Croix, as she had been since May 9, 1974 (120). Prior to her departure, she had purchased and placed in her "Hill Villa"

⁴ Another of the men who lived there was Dominic's brother, whom Mrs. Swift knew as "Addie" (119).

apartment a fireproof filing cabinet into which she put part of her coin collection⁵ and her own common stocks, as well as those belonging to her son and to the Arthur Hyde Foundation (123-126).⁶ The remainder of the coin collection was stored in an antique iron safe located in the master bedroom of another of Mrs. Swift's St. Croix houses known as "The Chalet" (130).

Only Mrs. Swift and Mrs. Westerman knew where the keys to the safe and the filing cabinet were located (128). However, a man named Douglas Gulman, who had at one time lived in Mrs. Swift's apartment, had keys to that apartment (201-202).

On July 10, 1974, while Mrs. Swift was still on vacation, Mrs. Westerman discovered that the safe at "The Chalet" had been burglarized and that all the coins were missing (169-170). On the same day, prompted by this initial discovery, Mrs. Westerman checked the filing cabinet at the "Hill Villa" apartment (171). It, too, had been tampered with,⁷ and Mrs.

⁵Mrs. Swift testified that she had approximately 10,000 silver coins (140).

⁶The stocks were principally in Rosario Resources, Gold Canada, Texas Gulf, O'Keefe Copper, Cominko of Canada, and Swiss Chalet (125).

⁷There was no indication, however, that the apartment itself had been broken into.

Westerman subsequently discovered that the rest of the coins and the securities had been stolen (171-172, 176).⁸

According to Mrs. Westerman, July 10, 1974, was the last time she saw Rotardier and appellant Pena. She remembered that when she brought the police to "Hill Villa" to investigate the theft, she saw Rotardier and Pena get into a taxi (175). The two other men with whom they shared the ground floor apartment remained for at least two more days (176).⁹

Arthur Sherman, a vice-president of Sherson Hayden Stone testified that on July 11, 1974, Kingsley Rotardier, who identified himself as Stephen Hyde Swift, and another man known to Sherman as Harvey Bernstein, entered the Park Avenue offices of the brokerage house. They were accompanied by a third man who was never introduced to Sherman but whom he identified at trial as appellant Pena (41).¹⁰

⁸This discovery was not made until July 16, 1974, when the drawers, rendered inoperable by the tampering, were finally opened.

⁹Mrs. Westerman also testified that around Easter of this year, while cleaning the ground floor apartment, she found in the far recesses of one of the closets some bags like the ones in which Mrs. Swift had kept the coins (180-181). Mrs. Westerman also found the charred remains of a coin specimen book (182).

¹⁰According to Sherman, all three men were dressed casual. One of them wore a Panama hat and "khaki colored canvas type clothes." They also wore sandals (41).

Rotardier and Bernstein wanted to open a joint margin account, an account in which securities are deposited as collateral for loans with which to purchase additional securities (39-42, 50). The securities to be used to open the account were personally presented by Rotardier who, Sherman observed, removed them from a suitcase he was carrying (51).¹¹ Then Rotardier, posing as Swift, and Bernstein signed the papers required to establish the joint account: a new account form (42); a stock power form and lending agreement (45); a trading authorization which empowered Bernstein to trade the account for "Swift" (47); a joint account agreement (48); and a commodity agreement authorizing the trading of commodities (48-49).

The account was set up jointly despite Sherman's explanation to Rotardier and Bernstein, presumably within appellant Pena's hearing, that to do so created a joint tenancy with a right of survivorship, which meant that if either man were to die the entire interest in the account would vest in the survivor (71).

¹¹ Rotardier offered securities in Stephen Swift's name, as well as in the names of Caroline Hyde and the Arthur Hyde Foundation (52-53). Sherman would accept only the stocks in Stephen Swift's name (53). Those securities were introduced as Government Exhibits #7-20, and it was agreed by stipulation that their total value as of July 11, 1974, was \$36,337 (52, 75-76).

According to Sherman, appellant Pena did not participate in any way in the stock transaction.

Richard Genot, a numismatist with Harmer Rooke, Limited, testified that some time between July 6 and July 9, 1974, three tanned men dressed in off-white tropical suits came into his shop at Three East 57th Street (78-79). Genot could not identify any of the men, but he did remember that only two of the three negotiated with him, offering to sell a large quantity of American silver coins (79). On July 16, 1974, the men returned with the coins (84). Genot agreed to buy them for a total of \$23,719. As instructed, he made out the bill of sale and the check to one Kingsley Rotardier, who was staying at the Warwick Hotel (83, 88, 89). He gave the check to Rotardier (88).

Christine Afarelli, an assistant manager of the Chase Manhattan Bank, testified that she approved and cashed the Harmer Rooke check for Kingsley Rotardier (91-94).¹²

¹²The Government also presented the testimony of Bobby Banks, a limousine chauffeur (95-98), who asserted that some time in the summer of 1974 he drove Rotardier, whom he knew as Mr. Wainwright, and two others, whom he could not identify, around the city to look for an apartment. All three men wore tropical suits, Panama hats, and casual shoes.

John Conroy, formerly a detective with the New York City Police Department, testified as to the arrest of Rotardier and appellant Pena on August 8, 1974 (108-113). According to Conroy, at the time of the arrest he seized from appellant Pena a driver's license and a birth certificate for Joseph Hodge Winall. Rotardier was carrying identification for one Noel Wainwright Winall (110).

At the close of the Government's case counsel for appellant Pena moved for a judgment of acquittal on the ground that the evidence presented by the Government was insufficient to support a conviction (206). The motion was denied (210). The defense rested (213), the motion as to sufficiency of the evidence renewed, and the motion again denied (214).

In his charge to the jury,¹³ Judge Bonsal instructed the jurors that if they found appellant Pena to be a member of the conspiracy, they could convict him on the substantive counts as well (285).

While the trial judge charged the jury that the guilt or innocence of each defendant must be considered separately (269),

¹³The complete charge is annexed as "C" to the joint appendix to appellants' briefs.

and that mere association between the defendants will not establish guilt (277), the judge never told the jury that presence with knowledge of illegal activity is not enough to convict.¹⁴

In addition, as an alternative theory of guilt, the judge instructed the jury that the required knowledge that the property had been stolen could be inferred from possession of recently stolen goods (285).

After deliberations, the jury found appellant Pena guilty of all three counts charged in the indictment (299-300).

¹⁴This error was exacerbated by the judge's misstatement of the evidence to indicate that it was appellant Pena, rather than Bernstein, who sought to open a joint account with Rotardier (277).

ARGUMENT

Point I

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT EITHER THE CONSPIRACY OR THE SUBSTANTIVE CONVICTIONS FOR TRANSPORTATION OF STOLEN GOODS IN INTERSTATE COMMERCE.

Both at the close of the Government's case and after the defense rested,¹⁵ trial counsel for appellant Pena moved for a judgment of acquittal on the ground that the evidence would not support a conviction for either conspiracy to transport or the substantive transportation of the stolen securities and coins. The evidence arguably related to Pena, viewed in the light most favorable to the Government,¹⁶ established the following facts:

(1) During the spring and summer of 1974 appellant Pena lived with Kinsley Rotardier in an apartment the latter rented at "Hill Villa," a house owned by Caroline Hyde Swift;

¹⁵The defense did not present any evidence.

¹⁶Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Johnson, 513 F.2d 819, 821 (2d Cir. 1975); United States v. Koss, 506 F.2d 1103, 1106 (2d Cir. 1974); United States v. Sisca, 503 F.2d 1337, 1342 (2d Cir. 1974); United States v. McCarthy, 473 F.2d 300, 302 (2d Cir. 1972).

(2) On July 10, 1974,¹⁷ appellant Pena accompanied Mr. Rotardier who, in default of his rent, vacated the apartment;

(3) Two other men, one of them appellant Pena's brother, with whom Pena and Rotardier shared the apartment remained there for at least two more days;

(4) An iron safe and a locked filing cabinet belonging to Mrs. Swift were burglarized and certain common stock certificates and silver coins were stolen. The robbery of the safe was discovered on July 10, 1974;

(5) Approximately two years later bags similar to those Mrs. Smith used to store her coins were discovered hidden in the far reaches of a closet in the former Rotardier apartment;

(6) On July 11, 1974, in the New York City offices of Hayden Stone, Kingsley Rotardier and a man identified as one Harvey Bernstein sought to open a joint margin account using stock belonging to Stephen Hyde Swift. This kind of account gave Bernstein and Rotardier exclusive interest in the stock. Appellant Pena was present during this transaction, but did not participate in it;

(7) On July 16, 1974, Rotardier, accompanied by two unidentified men, sold a large collection of silver coins to

¹⁷The date of Rotardier's departure from St. Croix is not certain since, if the evidence presented by the numismatist is to be believed, Rotardier was in New York City some time between July 6 and July 9.

a numismatist whose shop is located on East 57th Street in New York City. The proceeds of the sale went to Rotardier alone;

(8) When arrested, appellant Pena was carrying a driver's license and a birth certificate bearing the name of Joseph Hodge Winall.

Together, all these facts establish only that appellant Pena associated with his close friend, Rotardier, during the period in which Rotardier engaged in a criminal enterprise. This evidence is woefully inadequate to justify any of appellant Pena's three convictions below.

To prove Pena's guilt of the conspiracy charge, the Government had to show that there was a knowing agreement between Pena and Rotardier to transport securities and coins knowing they were stolen.¹⁸ Iannelli v. United States, 95 S.Ct. 1284, 1289-1290 (1975); Direct Sales Co. v. United States, 319 U.S. 703 (1943). At the very least, "[t]here must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or

¹⁸ Since knowledge of the stolen character of the property is essential for conviction of the substantive crime of interstate transportation (18 U.S.C. §2314), it is essential for conviction of conspiracy to violate that statute. United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975); United States v. Steward, 451 F.2d 1203 (2d Cir. 1971); United States v. Hysohion, 448 F.2d 343, 347 (2d Cir. 1971).

make it succeed." United States v. Cirillo, 449 F.2d 872, 883 (2d Cir. 1974); United States v. Johnson, 513 F.2d 819, 823 (2d Cir. 1975); United States v. Amato, 495 F.2d 545, 550 (5th Cir. 1974); United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970); United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963); see also United States v. Oliva, 497 F.2d 130 (5th Cir. 1974).

The record in this case is devoid of proof that appellant Pena even knew when he left St. Croix with Rotardier that Rotardier was involved in transporting stocks and coins, much less stolen stocks and coins.¹⁹ This case is identical to United States v. Johnson, *supra*, 513 F.2d 819, where this Court found insufficient to establish a smuggling conspiracy the defendant's presence in the car in which the illegal drugs were concealed. In Johnson, as in this case, the defendant had been traveling outside the United States with a close friend who was involved in the illegal activity. The court there specifically rejected the Government's contention that the closeness of the association between Johnson and the

¹⁹There being no direct proof that appellant Pena knew the stocks were stolen, the Government sought to rely, and the Judge charged the jury, that an inference of knowledge could flow from possession of recently stolen goods. However, Pena never possessed the property. The record reveals that only Rotardier had actual possession, and nothing Pena did gave him the requisite dominion and control to establish constructive possession. United States v. Steward, *supra*, 451 F.2d 1023; United States v. Kearse, 444 F.2d 62 (2d Cir. 1971).

co-defendant, coupled with Johnson's presence in the car when the drugs were discovered, was enough to convict.

The missing proof of knowledge of Rotardier's activities is not, as the Government argued below, supplied by appellant Pena's departure from St. Croix on July 10, the day the burglary was discovered. Not only is the date of departure not certain -- Mrs. Westerman said that Rotardier and appellant Pena left on July 10, but Genot saw Rotardier in New York between July 6 and July 9 -- the act itself is too equivocal to indicate appellant Pena's awareness of the illegality. Jones v. United States, 365 F.2d 87 (10th Cir. 1966); United States v. Irons, 475 F.2d 40, 42 (8th Cir. 1973); Bailey v. United States, 416 F.2d 1110, 1114 (D.C. Cir. 1969); see also United States v. Johnson, *supra*; United States v. Infanti, 474 F.2d 522, 527 (2d Cir. 1973) (false exculpatory statements). On these facts, it was possible that appellant Pena believed that Rotardier was leaving because he had been threatened with eviction, and that Pena left simply because Rotardier did. That the departure was not flight to avoid apprehension is further demonstrated by the fact that appellant Pena's brother and the unidentified fourth man remained in the St. Croix apartment after Rotardier and appellant left.

Nor is proof of the requisite knowledge established by appellant Pena's presence at the Hayden Stone meeting in New York. Whatever knowledge appellant acquired when Rotardier and Bernstein opened the joint account, it was acquired well

after object of the supposed conspiracy -- transportation of the stocks to New York -- was achieved.

Moreover, even if appellant Pena did have timely knowledge of Rotardier's actions, the addition of that fact would not make him a co-conspirator. The law is clear that mere presence, even if enhanced by the knowledge that a crime is being committed, will not establish the requisite participation in the conspiracy. United States v. Johnson, *supra*, 513 F.2d at 823; United States v. Quintana, 508 F.2d 867, 880 (7th Cir. 1975); United States v. Williams, 503 F.2d 50, 54 (6th Cir. 1974); United States v. Keach, 480 F.2d 1274, 1287-1288 (10th Cir. 1973); Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969); Jones v. United States, *supra*, 365 F.2d 87. Even frequent or continuous presence will not amount to the necessary indicia of agreement to participate.²⁰ United States v. Quintana, *supra*, 508 F.2d at 880; United States v. Keach, *supra*,

²⁰ Nor does appellant Pena's possession at the time of his arrest of the bogus identification indicate his participation in the conspiracy charged here. The use of the name Joseph Winall was not any part of the scheme for which Pena was indicted. That he might have been involved in some other illegal activity does not establish his participation in this conspiracy. United States v. Alois, 511 F.2d 585, 597 (2d Cir. 1975).

480 F.2d at 1287; United States v. Cantone, 426 F.2d 902 (2d Cir. 1970), cert. denied, 400 U.S. 827 ().²¹

This is particularly true, as it was in this case, when all the other evidence presented establishes that the defendant had no stake in the venture. United States v. Amato, supra. Here, what the Government actually proved was that Kingsley Rotardier and Harvey Bernstein were to benefit exclusively from the conspiracy to transport the securities. The creation of a joint margin account assured that only Rotardier and Bernstein could control the stock and that appellant Pena had no interest. So, too, with the stolen coins: the check in payment for the silver was made payable to Rotardier only, and he alone cashed it.

The Government's failure to prove appellant Pena's knowing participation in the conspiracy requires reversal of the conviction on Count One.

The same analysis applies to the convictions on the two substantive counts of transportation. The record is devoid of evidence to show that appellant Pena personally transported either the stocks or the coins. The only theory of

²¹In Keach, supra, the defendant Seay reportedly accompanied Keach and was present on several separate occasions when Keach discussed his plans for making counterfeit bills with the undercover federal agent. In Quintana, supra, the defendant was often present at his godfather's clothing store where narcotics deals of which he was aware occurred.

guilt,²² and the one upon which the Government relied, is that appellant Pena aided and abetted the transportation. As the Supreme Court said in Nye and Nissen v. United States, 336 U.S. 613, 619 (1949), quoting this Court's opinion in United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), aiding and abetting requires

... that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.

Proof of participation in the crime of transportation is absent here, as it was on the conspiracy charge. There is nothing in this record from which it could be argued that appellant Pena contributed to Rotardier's venture so as to make it succeed. Pena never possessed the goods, he never carried them,²³ nor did he ever negotiate for the sale. Significantly, appellant Pena did not have a stake in the venture since the evidence reveals that he did not share in the spoils.

²²The insufficiency of the evidence on the conspiracy of course invalidates the substantive convictions obtained under Pinkerton v. United States, 328 U.S. 640 (1946).

²³There is no proof in the record to establish that appellant Pena was one of the two unidentified men at Harmer Rooke. This precludes a finding that he helped carry the coins into the back room. In any event, even if it were found that Pena was one of those men, this action occurred well after the completion of the substantive crime, and is inadmissible as proof thereof. United States v. Keach, supra, 480 F.2d at 1287; Roberts v. United States, supra, 416 F.2d at 1221.

All that remains is the fact of appellant Pena's presence with Rotardier, both in St. Croix and in New York. There was no proof that Pena actually knew of Rotardier's illegal venture until after its completion when he observed Rotardier impersonate Stephen Swift at the Hayden Stone offices.

Presence at the scene of a crime, even presence with the knowledge of criminality, absent here, will not satisfy the requirements of aiding and abetting. United States v. Garguilo, 310 F.2d 249, 252-253 (2d Cir. 1962); United States v. Irons, supra, 475 F.2d 40; Bailey v. United States, supra, 416 F.2d 110; Baker v. United States, 395 F.2d 368 (8th Cir. 1968).²⁴

Since the Government failed in its proof as to all three convictions obtained below, the judgment must be reversed and the case remanded with instructions to enter a judgment of acquittal as to appellant Pena.

²⁴In Irons, supra, the court of appeals found that a wife's presence during her husband's nighttime attempt to break through the wall of a bank and her subsequent flight did not establish that she aided and abetted his crime.

Similarly, in Bailey, supra, the court found that the defendant's presence some ten feet away from a robbery, his prior discussions with the robber, and his subsequent flight did not amount to aiding and abetting.

Point II

IT WAS REVERSIBLE ERROR TO FAIL TO CHARGE
THE JURY THAT MERE PRESENCE COUPLED WITH
KNOWLEDGE WILL NOT ESTABLISH PARTICIPATION.

Assuming, arguendo, that this Court finds that the evidence was sufficient to support the convictions, the case must still be remanded for retrial because the trial judge failed to give the so-called "Garguilo charge." United States v. Garguilo, supra, 310 F.2d at 254-255; United States v. Terrell, 474 F.2d 872, 876 (2d Cir. 1973). That charge provides an explicit and careful cautionary statement to the jury that

mere presence and guilty knowledge on the part of [the defendant] would not suffice unless they were also convinced beyond a reasonable doubt that [the defendant] was doing something to forward the crime -- that he was a participant rather than merely a knowing spectator.

United States v. Garguilo,
supra, 310 F.2d at 254.

In the factual context of this case, where the evidence, if sufficient, is so "only by a hair's breadth" (United States v. Lefkowitz, 284 F.2d 310 (2d Cir. 1960)), giving this charge was critical. United States v. Terrell, supra; United States v. Garguilo, supra. In fact, this Court has held that it should be given even without request. United States v. Terrell, supra, 474 F.2d at 876, n.2. Without it, the jurors were free to conclude, as it is likely they did here, that

appellant Pena was guilty because he was often in Rotardier's company and because by the time of the Hayden Stone meeting he knew of the theft of the securities.

That the judge below told the jurors they were to consider guilt on an individual basis, that they must find participation, and that mere presence was not enough will not suffice to compensate for the deficiency. This Court has rejected just such an argument in United States v. Garguilo, supra, 310 F.2d at 252. The problem with the instruction as a whole is that it still allowed the jury to find participation based on presence with knowledge of the criminal activity. As a consequence of this error, the convictions must be reversed and the case remanded for a new trial.

Point III

THERE BEING NO EVIDENCE THAT APPELLANT PENA POSSESSED THE SECURITIES OR THE COINS, IT WAS REVERSIBLE ERROR TO INSTRUCT THAT POSSESSION WOULD CAUSE RISE TO THE INFERENCE OF KNOWLEDGE THAT THE PROPERTY WAS STOLEN.

The record is devoid of any evidence to show that appellant Pena ever possessed either the securities or the coins. How the property physically got from St. Croix to New York is never explained. Once in New York, the proof as to possession occurring after completion of the crimes was irrelevant. In any event, the only proof as to possession was directed at Rotardier.

Despite the absence of evidence as to appellant Pena's possession, the judge instructed the jurors that possession of the property recently stolen would support the inference that the possessor had the requisite knowledge of its stolen character. This was error requiring reversal.

Instructing the jury on an abstract principle of law which, although technically correct, has no application to the issues or facts in this case, is prejudicially misleading. United States v. Martin, 507 F.2d 428, 430 (7th Cir. 1974); United States v. Torrence, 480 F.2d 564 (5th Cir. 1973); Wright, FEDERAL PRACTICE AND CRIMINAL PROCEDURE, §485 (1969). That is particularly true in this case where, so instructed, the jury might have improperly found possession based on

association with Rotardier, and then guilty knowledge could be based on possession.

Point IV

INSOFAR AS THEY MAY BE APPLICABLE TO HIS CASE, APPELLANT PENA ADOPTS THOSE ARGUMENTS RAISED ON BEHALF OF APPELLANT ROTARDIER.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded with instructions to enter a judgment of acquittal; alternatively, the case must be remanded to the District Court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

SEPTEMBER 22, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to counsel for the co-appellant.

Shari Gensberg